



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 10

1200 Sixth Avenue
Seattle, WA 98101

DEC - 2 2004

Reply To
Attn Of: OWW-131

Melissa Powers
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219

Dear Ms. Powers:

This letter is to respond to certain issues you have raised to EPA in the three notices of intent to sue dated May 25, 2004, May 26, 2004, and June 19, 2004. Specifically, we thought it would be productive to explain to you why EPA did not take action on the particular provisions of Oregon's regulations you cited in your notices. In this letter, we provide a general explanation of how EPA approaches water quality standards review under section 303(c) of the Clean Water Act ("CWA"). We have provided a detailed explanation for each specific provision you cited in the enclosed chart.

As you know, under the CWA, EPA has a mandatory duty to review new or revised water quality standards adopted by a state¹ and submitted to EPA. 40 C.F.R. § 131.21. The CWA and EPA's regulations define water quality standards as establishing designated uses, water quality criteria, and an antidegradation policy. CWA § 303(c)(2)(A); 40 C.F.R. § 131.3(i); PUD No. 1 of Jefferson County, et al. v. Washington Department of Ecology, et al., 511 U.S. 700, 704-05 (1994). States also often include provisions in their regulations that are related to improving and protecting water quality through other programs implementing the CWA, such as NPDES permitting of point sources (under CWA § 402); TMDL listing and establishment (under CWA § 303(d)); state certification (under CWA § 401); or enforcement of water quality standards under state law. While these additional provisions often affect water quality, EPA does not view any of these provisions as water quality standards, and thus EPA does not review them under section 303(c) of the CWA. Some of these types of provisions, such as NPDES provisions, may constitute NPDES permit program revisions and are subject to review under the NPDES permit program regulations at 40 C.F.R. § 123.62(b). Other provisions describe how a TMDL is to be established, and EPA reviews the resulting TMDLs under 40 C.F.R. § 130.7. For EPA to assert that any provision that is in any way related to water quality is a "water quality standard" subject to a mandatory duty for review and approval would swallow almost all of EPA's CWA program under the rubric of section 303(c) of the CWA. As explained further in the attached chart, EPA

¹ Where EPA refers to "state" in this letter, EPA intends to include tribes and territories as well.

did not act on some of the provisions you cited in your three notices because they were not water quality standards, but rather were either NPDES permitting provisions, TMDL provisions, CWA section 401 state certification provisions, or provisions which address Oregon's discretionary authority in enforcement of its water quality standards under state law.

States also include in their regulations provisions relating to or controlling nonpoint sources. As EPA does not have authority to directly regulate releases of pollutants from nonpoint sources, see Pronsolino v. Nastri, 291 F.3d 1123, 1126-27 (9th Cir. 2002); American Wildlands, et al. v. Browner, et al., 260 F.3d 1192, 1198 (10th Cir. 2001), EPA does not view the mandatory duties under section 303(c) as applicable to such state nonpoint source provisions. Instead, EPA views these provisions as within the purview of state law. As explained further in the attached chart, EPA did not act on some of the provisions you cited in your three notices because they were related to nonpoint sources.

EPA also does not have a mandatory duty to review unchanged water quality standards. National Wildlife Federation v. Browner, 127 F.2d 1126, 1131 (D.C. Cir. 1997). Where the state has not changed the substance of a provision, but has simply reformatted, renumbered or made minor editorial changes that do not change the substance of the water quality standards, EPA views the standards as unchanged. As explained further in the attached chart, EPA did not act on some of the provisions you cited in your three notices because they did not constitute a substantive change to Oregon's water quality standards.

We look forward to discussing these issues with you in detail at our upcoming December 14 meeting and hope that we can avoid litigation and focus our efforts on improving water quality in Oregon.

Sincerely,

A handwritten signature in black ink, appearing to read "M. Gearheard", with a large, stylized flourish extending from the end of the signature.

Michael F. Gearheard
Director
Office of Water and Watersheds

Enclosure

No Action Chart
Reasons for Not Taking Action on Provisions In Oregon's December 2003 Submittal

| Provisions | Reasons For Non-Action |
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| <p>OAR 340-041-0004 [Note: EPA previously approved the language in (4) but include it to give context to sections (a) and (b).] (4) Recurring activities. Since the baseline for applying the antidegradation policy to an individual source is the water quality resulting from the source's currently authorized discharge, and since regularly-scheduled, recurring activities remain subject to water quality standards and the terms and conditions in any applicable federal and state permits, certifications and licenses, the following activities will not be considered new or increasing discharges and will therefore not trigger an antidegradation review under this rule so long as they do not increase in frequency, intensity, duration or geographical extent: (a) Rotating grazing pastures (b) Agricultural crop rotations</p> | <p>To the extent this provision relates to regulated discharges, EPA approved this provision on March 2, 2003. See Support Document for EPA's Action Reviewing New or Revised Water Quality Standards for the State of Oregon, March 2, 2004, p. 27. To the extent this provision applies to nonpoint sources, EPA did not act on this provision. Specifically, this provision exempts both "rotating grazing pastures" and "agricultural crop rotations" from antidegradation provisions as "recurring activity" that does not result in increased discharges subject to antidegradation review. EPA does not have authority to regulate nonpoint sources. <u>American Wildlands v. Browner</u>, 260 F.3d 1192, 1198 (10th Cir. 2001); <u>Pronsolino v. Natri</u> 291 F.3d 1123, 1126-27 (9th Cir. 2002) (citing <u>Oregon Natural Res. Council v. U.S. Forest Service</u>, 834 F.2d 842, 849 (9th Cir. 1987) and <u>Oregon Natural Desert Assoc. v. Dombeck</u>, 172 F.3d 1092, 1096 (9th Cir. 1998). Even if EPA disapproved such provisions, EPA could not compel the state to require such sources to undergo antidegradation review.</p> |

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| <p>OAR 340-041-0007 State Wide Narrative Criteria (3) Point source discharges must follow policies and guidelines in OAR 340-041-0004, and nonpoint source activities must follow guidelines in sections (6), (8), (9), (10), (11), and (12) of this rule.</p> | <p>This provision is not a WQS. It establishes no uses, criteria or policies which are binding requirements, but rather is a reference to policies which apply to either point sources or nonpoint sources. The substantive policies themselves have not been revised. EPA does not act on nonpoint source provisions.</p> <p>The old statutory cite is 340-41-026(b).</p> <p>The reference to 0004 is new for point sources, i.e., antidegradation. As for nonpoint sources, while the numbering references changed, all the provisions cited are the same or else included in subsequent sections with the exception of the addition of (12), which adds a requirement that nonpoint sources may not create toxic conditions for fish, etc. Also, (7) is deleted from the nonpoint source section as it refers to log handling facilities (which is correct since they are point sources, not nonpoint sources). So while some numbers are different, the language in the renumbered sections is the same except as discussed below.</p> <p>There have been two changes to the requirements for policies which nonpoint sources must follow. First, (12) is an addition requiring that <i>(quote)</i>. Second, the policy regarding log handling facilities is no longer referenced with regard to nonpoint sources, which is correct since log handling facilities are point sources.</p> |
| <p>OAR 340-041-0007 State Wide Narrative Criteria (10) In order to improve controls over nonpoint sources of pollution, federal, State, and local resource management agencies will be encouraged and assisted to coordinate planning and implementation of programs to regulate or control runoff, erosion, turbidity, stream temperature, stream flow, and the withdrawal and use of irrigation water on a basin-wide approach so as to protect the quality and beneficial use of water and related resources. Such programs may include, but not be limited to, the following: (e) Federal water quality restoration plans</p> | <p>Not a WQS. Does not establish binding requirements.</p> <p>Also relates to nonpoint sources and EPA does not act on nonpoint source provisions because EPA does not have authority to regulate nonpoint sources.</p> |

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| <p>OAR 340-041-0007 (17) Minimum Design Criteria for Treatment and Control of Wastes. Except as provided in OAR 340-041-0101 through OAR 340-041-0350, and subject to the implementation requirements set forth in OAR 340-041-0061, prior to discharge of any wastes from any new or modified facility to any waters of the State, such wastes must be treated and controlled in facilities designed in accordance with the following minimum criteria.</p> | <p>The language of this provision was not changed. The State moved general language on treatment into this provision and left the basin-specific conditions in each particular basin section.. The only addition to this language was to identify the new regulatory sections for each specific basin. (In other words, there was no change except that it included basin-specific language as well as these identical general requirements that were in each basin (see, e.g., the Willamette cite in the 1996 regulations at 340-41-455)).</p> <p>Further, this is not a WQS. It is a permit provision establishing minimum technology-based requirements.</p> |
| <p>OAR 340-041-0009 Bacteria (10) Water Quality Limited for Bacteria. In those water bodies, or segments of water bodies, identified by the Department as exceeding the relevant numeric criteria for bacteria in the basin standards and designated as water quality limited under section 303(d) of the Clean Water Act, the requirements specified in section 11 of this rule and in OAR 340-041-0061(12) must apply.</p> | <p>There are no substantive changes to this provision. The changes which are bolded refer to the revised section numbers for the same provisions which were included in the 1996 WQS. (The previous cite for section 11 was 340-41-026(3)(a)(I). The previous cite for 0061(12) was 340-41-120(10). The previous cite for 0009(10) was 340-41-120(17). All of these provisions remain substantively unchanged.)</p> |
| <p>OAR 340-041-0028 (6) Natural Lakes. Natural lakes may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the ambient condition unless a greater increase would not reasonably be expected to adversely affect fish or other aquatic life.</p> | <p>EPA is currently working with the State such that the State would replace this temperature provision with one that would protect the designated use.</p> |
| <p>OAR 340-041-0028 (7) Oceans and Bays. Except for the Columbia River above river mile 7, ocean and bay waters may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the ambient condition unless a greater increase would not reasonably be expected to adversely affect fish or other aquatic life.</p> | <p>EPA is currently working with the State such that the State would replace this temperature provision with one that would protect the designated use.</p> |
| <p>OAR 340-041-0028 (9) Cool Water Species. Waters that support cool water species may not be warmed by more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) above the ambient condition unless a greater increase would not reasonably be expected to adversely affect fish or other aquatic life. Cool waters of the State are described on subbasin tables set out in OAR 340-041-0101 to OAR 340-041-0340: Tables 140B, 180B, 201B, and 250B.</p> | <p>EPA is currently working with the State such that the State would replace this temperature provision with one that would protect the designated use.</p> |

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| <p>OAR 340-041-0028 (10) Borax Lake Chub. State waters in the Malheur Lake Basin supporting the borax lake chub may not be cooled more than 0.3 degrees Celsius (0.5 degrees Fahrenheit) below the ambient condition.</p> | <p>EPA is currently working with the State such that the State would replace this temperature provision with one that would protect the designated use.</p> |
| <p>OAR 340-041-0028 (12) Implementation of the Temperature Criteria. (a) Minimum Duties. There is no duty for anthropogenic sources to reduce heating of the waters of the State below their natural condition. Similarly, each anthropogenic point and nonpoint source is responsible only for controlling the thermal effect of its own discharge or activity in accordance with its overall heat contribution. In no case may a source cause more warming than that allowed by the human use allowance provided in subsection (b) of this rule.</p> | <p>Not a WQS This provision does not establish or revise any designated use or criteria for temperature that was developed, approved and in effect under the CWA. It does not describe the amount of heat allowed to protect a designated use (temperature criteria) but instead provides enforcement discretion under state law.</p> <p>EPA did act on the human use allowance provision of the Oregon rules; thus EPA did act on the substance of the last sentence of this provision.</p> |
| <p>OAR 340-041-0028 (12)(b) Human Use Allowance. Insignificant additions of heat are authorized in waters that exceed the applicable temperature criteria as follows: (D) A point source in compliance with the temperature conditions of its NPDES permit is deemed in compliance with the applicable criteria.</p> | <p>Not a WQS. This provision is an articulation of enforcement compliance discretion. The State has authority to exercise enforcement discretion.</p> |
| <p>OAR 340-041-0028 (12)(d) Lowflow Conditions An exceedance of the biologically-based numeric criteria in section (4) of this rule, or an exceedance of the natural condition criteria in section (8) of this rule will not be considered a permit violation during stream flows that are less than the 7Q10 low flow condition for that waterbody.</p> | <p>Not a WQS. It is enforcement discretion as part of the State's NPDES program, i.e., what the State considers a permit violation.</p> |

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| <p>OAR 340-041-0028 (12)(e) Forestry on State and Private Lands. For forest operations on State or private lands, water quality standards are intended to be attained and are implemented through best management practices and other control mechanisms established under the Forest Practices Act (ORS 527.610 to 527.992) and rules thereunder, administered by the Oregon Department of Forestry. Therefore, forest operations that are in compliance with the Forest Practices Act requirements are (except for the limits set out in ORS 527.770) deemed in compliance with this rule. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.</p> | <p>Not a WQS. Whether a state chooses to make water quality standards directly enforceable is solely a matter of state law. Federal law (the CWA) requires an NPDES permit for discharges from point sources and compliance with that permit. The CWA does not require that states make their standards directly enforceable. Thus, a state's choice to limit the state law requirement to make standards directly enforceable is solely a matter of state law.</p> <p>The first sentence does not establish any binding requirements. The second sentence is not a water quality standard because it relates to a requirement of state law beyond the CWA; it limits the state law requirement that would otherwise make water quality standards directly enforceable. The third sentence does not establish any binding requirements, but expresses an intent to work on a state law provision toward attaining water quality standards. This provision does not change the underlying criteria.</p> <p>Note: EPA understands this provision to apply to nonpoint sources.</p> |
| <p>OAR 340-041-0028 (12)(f) Agriculture on State and Private Lands. For farming or ranching operations on State or private lands, water quality standards are intended to be attained and are implemented through the Agricultural Water Quality Management Act (ORS 568.900 to 568.933) and rules thereunder, administered by the Oregon Department of Agriculture. Therefore, farming and ranching operations that are in compliance with the Agricultural Water Quality Management Act requirements will not be subject to DEQ enforcement under this rule. DEQ will work with the Oregon Department of Agriculture to revise the Agricultural Water Quality Management program to attain water quality standards.</p> | <p>Not a WQS. See explanation of 340-041-0028(12)(e), above.</p> <p>Note: EPA understands this provision to apply to nonpoint sources.</p> |

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| <p>OAR 340-041-0028 (12)(g) Agriculture and Forestry on Federal Lands. Agriculture and forestry activities conducted on federal land must meet the requirements of this rule and are subject to the department's jurisdiction. Pursuant to Memoranda of Agreement with the U.S. Forest Service and the Bureau of Land Management, water quality standards are expected to be met through best management practices and aquatic conservation strategies. Where a Federal Agency is a Designated Management Agency by the Department, implementation of these plans, practices and strategies is deemed compliance with this rule.</p> | <p>Not a WQS. See explanation of 340-041-0028(12)(e), above.</p> <p>Note: EPA understands this provision to apply to nonpoint sources.</p> |
| <p>OAR 340-041-0028 (12)(h) Other Nonpoint Sources. The department may, on a case-by-case basis, require nonpoint sources (other than forestry and agriculture), including private hydropower facilities regulated by a 401 water quality certification, that may contribute to warming of State waters beyond 0.3 degrees Celsius (0.5 degrees Fahrenheit), and are therefore designated as water-quality limited, to develop and implement a temperature management plan to achieve compliance with applicable temperature criteria or an applicable load allocation in a TMDL pursuant to OAR 340-042-0080.</p> <p>(A) Each plan must ensure that the nonpoint source controls its heat load contribution to water temperatures such that the water body experiences no more than a 0.3 degrees Celsius (0.5 degree Fahrenheit) increase above the applicable criteria from all sources taken together at the maximum point of impact.</p> <p>(B) Each plan must include a description of best management practices, measures, effluent trading, and control technologies (including eliminating the heat impact on the stream) that the nonpoint source intends to use to reduce its temperature effect, a monitoring plan, and a compliance schedule for undertaking each measure.</p> <p>(C) The Department may periodically require a nonpoint source to revise its temperature management plan to ensure that all practical steps have been taken to mitigate or eliminate the temperature effect of the source on the water body.</p> <p>(D) Once approved, a nonpoint source complying with its temperature management plan is deemed in compliance with this rule.</p> | <p>Not a WQS. These are planning and control provisions that do not change the underlying criteria.</p> <p>Note: EPA understands this provision to apply to nonpoint sources.</p> |

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| <p>OAR 340-041-0028 (12)(h)(D)(i) Compliance Methods. Anthropogenic sources may engage in thermal water quality trading in whole or in part to offset its temperature discharge, so long as the trade results in at least a net thermal loading decrease in anthropogenic warming of the water body, and does not adversely affect a threatened or endangered species. Source may also achieve compliance, in whole or in part, by flow augmentation, hyporheic exchange flows, outfall relocation, or other measures that reduce the temperature increase caused by the discharge.</p> | <p>Not a WQS. This is not a provision that describes uses, criteria or antidegradation. Rather, it is an authorizing provision that would allow trading as part of the State's establishment of TMDLs.</p> |
| <p>OAR 340-041-0028 (12) (h)(D)(ii) Release of Stored Water. Stored cold water may be released from reservoirs to cool downstream waters in order to achieve compliance with the applicable numeric criteria. However, there can be no significant adverse impact to downstream designated beneficial use as a result of the releases of cold water, and the release may not contribute to violations of other water quality criteria. Where the Department determines that the release of cold water is resulting in a significant adverse impact, the department may require the elimination or mitigation of the adverse impact.</p> | <p>Not a WQS. It does not change the use or criteria applicable to a use. It is a provision that the State could use to manage releases, similar to an NPDES provision, but applicable to dams.</p> |
| <p>OAR 340-041-0061 (11) Forestry on State and Private Lands. For forest operations on State or private lands, water quality standards are intended to be attained and are implemented through best management practices and other control mechanisms established under the Forest Practices Act (ORS 527.610 to 527.992) and rules thereunder, administered by the Oregon Department of Forestry. Therefore, forest operations that are in compliance with the Forest Practices Act requirements are (except for the limits set out in ORS 527.770) deemed in compliance with this Division. DEQ will work with the Oregon Department of Forestry to revise the Forest Practices program to attain water quality standards.</p> | <p>Not a WQS. See explanation of OAR 340-041-0028(12)(e), above.</p> |

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| <p>OAR 340-041-0061 (13) Agriculture and Forestry on Federal lands. Agriculture and forestry activities conducted on federal land must meet the requirements of this Division and are subject to the department's jurisdiction. Pursuant to Memoranda of Agreement with the U.S. Forest Service and the Bureau of Land Management, water quality standards are expected to be met through the development and implementation of water quality restoration plans, best management practices and aquatic conservation strategies. Where a Federal Agency is a Designated Management Agency by the Department, implementation of these plans, practices and strategies is deemed compliance with this Division.</p> | <p>Not a WQS. See explanation of 340-041-0028(12)(e), above.</p> |
| <p>OAR 340-041-0033 Toxic Substances</p> <p>(1) Toxic substances may [former "shall"] not be introduced above natural background levels in the waters of the State in amounts, concentrations, or combinations that may be harmful, may chemically change to harmful forms in the environment, or may accumulate in sediments or bioaccumulate in aquatic life or wildlife to levels that adversely affect public health, safety or welfare, aquatic life, wildlife, or other designated beneficial uses. [notice 6/18/04 p.5]</p> <p>(2) Levels of toxic substances may [former "shall"] not exceed the criteria listed in Table 20 which were based on criteria established by EPA and published in <i>Quality Criteria for Water</i> (1986), unless otherwise noted. [notice 6/18/04 p.5]</p> <p>(4) If the Department determines that it is necessary to monitor the toxicity of complex effluents, other suspected discharges or chemical substances without numeric criteria to aquatic life, then bio-assessment studies may be conducted. Laboratory bioassays or in-stream measurements of indigenous biological communities, properly conducted in accordance with standards testing procedures, may be considered as scientifically valid data for the purposes of section (3) of this rule. If toxicity occurs, the Department will [former "shall"] evaluate and implement necessary measures to reduce or eliminate the toxicity on a case-by-case basis.</p> | <p>(1) In the negative, changing "shall not" to "may not" is not a substantive change. (2) In the negative, changing "shall not" to "may not" is not a substantive change.</p> <p>From 1999 OR Standards Package: 340-041(Basin)(p) Toxic Substances: (D) Bio-assessment studies, such as laboratory bioassays or in-stream measurements of indigenous biological communities, shall be conducted as the Department deems necessary, to monitor the toxicity of complex effluents, or other suspected discharges or chemical substances without numeric criteria to aquatic life. These studies, properly conducted in accordance with standard testing procedures, may be considered as scientifically valid data for the purposes of paragraph (C) of this subsection. If toxicity occurs, the Department shall evaluate and implement measures necessary to reduce toxicity on a case by case basis."</p> <p>There is no substantive change in the provision because the decision of when to conduct a bio-assessment is based on the same purposes for such monitoring in both versions. Second, because the old language also called for bioassessment as the Department deemed necessary, EPA does not view the new language as adding discretion that was not already in the State's standards. Third, because implementation of "measures" based on such bioassessment on was allowed to occur on a case-by-case basis under the old rule, EPA did not view this as a substantive change; the State previously had discretion due to the language "case-by-case basis.</p> |

sources. As EPA does not have authority to directly regulate releases of pollutants from nonpoint sources, see Pronsolino v. Nastri, 291 F.3d 1123, 1126-27 (9th Cir. 2002); American Wildlands, et al. v. Browner, et al., 260 F.3d 1192, 1198 (10th Cir. 2001), EPA does not view the mandatory duties under section 303(c) as applicable to such state nonpoint source provisions. Instead, EPA views these provisions as within the purview of state law. As explained further in the attached chart, EPA did not act on some of the provisions you cited in your three notices because they were related to nonpoint sources.

EPA also does not have a mandatory duty to review unchanged water quality standards. National Wildlife Federation v. Browner, 127 F.2d 1126, 1131 (D.C. Cir. 1997). Where the state has not changed the substance of a provision, but has simply reformatted, renumbered or made minor editorial changes that do not change the substance of the water quality standards, EPA views the standards as unchanged. As explained further in the attached chart, EPA did not act on some of the provisions you cited in your three notices because they did not constitute a substantive change to Oregon's water quality standards.

We look forward to discussing

concurrency

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| NAME | KEENAN | A. ALLEN | | | |
| INITIAL | DK | AA | | | |
| DATE | 12/2/04 | 12/2/04 | | | |